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Supreme Court, U.S.
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FEB 5 1987
JOSEPH F. SPANIOL, JR.
CLERK

No.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

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UNITED STATES OF AMERICA,

Respondent,

v.

BROOKSIDE LIMITED PARTNERSHIP,

Petitioner.

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# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Joseph U. Esper
Forest Hills Plaza
Room 209
Yost at Ardmore Blvd.
Pittsburgh, PA 15221

February 4, 1986

69PP

The petitioner, Brookside Limited Partnership prays that a writ of Certiorari issue to review the final judgment order of the United States Court of Appeals for the Third Circuit entered in these proceedings on November 7, 1986.

## QUESTIONS PRESENTED

1. Was due process of the law under the 5th Amendment denied Brookside when the District Judge decided summarily that HUD procedures were not arbitrary and capricious even though Brookside produced some evidence of HUD's arbitrary and capricious actions, to wit: that in other real estate foreclosures HUD had as its established procedure: a) conferences in aid of preventing foreclosure; b) asking GNMA for a delay in election to assign the mortgage; c) presenting a work-out

arrangement calculated to rehabilitate the mortgage according to the ability of the project, taking into consideration such things as the massive unemployment that occurred in Beaver County, PA; d) to delay years before foreclosing; and where there was evidence of animus and malice in the actions of high level HUD officials; and where on the court record HUD cannot cogently explain why it exercised its discretion in the manner that it did; and where the reported cases of foreclosure all were delayed by HUD, to permit and attempt rehabilitation, from three (3) years to twelve (12) years; and where by the date of foreclosure sale HUD proceeds proceeded with full knowledge that Brookside had achieved a 93% occupancy from a cataclysmic low of less than 50% when economic disaster hit the Beaver

Valley.

2. Is the due process clause of the 5th Amendment violated by not permitting Brookside to have a hearing on its set-off against this HUD real estate foreclosure where the claim asserted can be satisfied by a reduction in the amount due under the mortgage without making claim against the United States Treasury?

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EDITOR'S NOTE

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The opinion of the United States District Court for the Western District of Pennsylvania, dated April 14, 1986, is reproduced in the Appendix to the Petition at page 1a.

The Judgment and Opinion of the United States Court of Appeals for the Third Circuit, dated November 7, 1986, is reproduced in the Appendix to the Petition at page 22a.

## STATEMENT OF JURISDICTION

Jurisdiction in the United States District Court was based upon subject matter under the Administrative Procedure Act, 5 U.S.C.A., Section 701 etseq., granting the Federal Court jurisdiction to review final decisions of Administrative Agencies.

The Court of Appeals for the Third Circuit, after denying oral argument, entered its opinion and judgment on November 7, 1986, affirming the judgment of the District Court.

Jurisdiction in the Supreme Court of the United States is invoked by the petition pursuant to 28 U.S.C. 1254 (1).

## STATUTES INVOLVED

Act of August 23, 1935, Chap. 614; 49 Stat. at L. 684, 722, 12 USCA Section 1702, "The Administrator shall, in carrying out the provisions of this title and titles II and III, be authorized, in his official capacity, to sue and be sued in any court of competent jurisdiction, State or Federal."

## STATEMENT OF THE CASE

This petition arises from an action in mortgage foreclosure brought by the United States of America on behalf of HUD, against Brookside Limited Partnership, as the result of a default in the mortgage payments, which default began in September of 1982.

In August of 1977, Brookside executed a mortgage note in the amount of Two-Million Seven-Hundred Thirty-Four and 00/100 ($2,734,000.00) Dollars, sec red by the Brookside Limited Partnership's property located in White Township, Beaver County, Pennsylvania. After failure to pay the September, 1982 payment, the mortgage note was assigned from Government National Mortgage Association to HUD, on or about December 10, 1982.

The defendant, Brookside Limited

Partnership, resisted the foreclosure by Answer and Counterclaim, alleging the following:

1. HUD had treated Brookside differently from other projects in failing to grant mortgage relief and proper work-out arrangements and in accelerating the debt and moving to foreclosure contrary to its own rules and regulations, and contrary to the aim and election of the National Housing Act.

2. Brookside asserted a Counterclaim stating that GNMA prevented Brookside or its agents from bidding at the GNMA auctions. It is asserted that had the bidding been allowed, HUD would not have been the

holder and the owner of the mortgage note and the foreclosure would not have occurred.

3. The United States, through GNMA, was prepared to sell the mortgage at sixty percent (60%) or less. Since these sales occurred prior to default and if Brookside would have been allowed to purchase the mortgage, the amount of the mortgage owed would have been approximately, One-Million Six-Hundred Twenty-Thousand and 00/100 ($1,620,000.00) Dollars.

The plaintiff, HUD, filed a Motion for Summary Judgment on April 12, 1984, which Motion was denied by the Court by Order filed on June 21, 1984.

The action proceeded with a series of Interrogatories, Depositions and Request for Admissions.

The plaintiff, HUD, filed a renewed Motion for Summary Judgment, on February 18, 1986, which was granted by the Court by Order entered on April 14, 1986.

A series of activity began after the Judgment April 14, 1986, involving a Writ of Assistance, questioning as to the amount of principal and interest owed on the mortgage and the right to immediate possession. A series of Orders resulted from this activity. The defendant, Brookside Limited Partnership, filed a Notice of Appeal from the Judgment and Order of April 14, 1986 on May 30, 1986.

On November 7, 1986, Judgment and Opinion was filed by the Circuit Court of Appeals affirming the District Court.

## REASONS FOR GRANTING THE PETITION

Brookside has produced some evidence of being treated by HUD differently than all other defaulting projects. To not require HUD to produce an explanation is to permit an unconscionable seizure of property without due process.

To not permit Brookside to have a hearing on its set-off against the mortgage only was not intended by Congress under 12 USCA 1702 (sue and be sued), and is a violation of due process.

## ARGUMENT I

DUE PROCESS OF THE LAW UNDER THE 5TH AMENDMENT WAS DENIED BROOKSIDE WHEN THE DISTRICT JUDGE DECIDED SUMMARILY THAT HUD PROCEDURES WERE NOT ARBITRARY AND CAPRICIOUS EVEN THOUGH BROOKSIDE PRODUCED SOME EVIDENCE OF HUD'S ARBITRARY AND CAPRICIOUS ACTIONS.

It is Brookside's position the court granted Summary Judgment on the issue of liability, while there were genuine issues of material fact remaining that precluded the granting of Summary Judgment.

The burden is on HUD, the moving party, to demonstrate there is no genuine issue as to material fact and that it is entitled to judgment as a matter of law.

The record must be viewed in the light most favorable to the opposing party and it must be viewed in the light most favorable to the opposing party and it must be given the benefit of all reasonable doubts and inferences.

This general proposition remains useful even though we have before us the issue of whether or not HUD, in deciding to foreclose on the mortgage was arbitrary, capricious and committed an abuse of discretion or acted otherwise not in accordance with the law. The issue is whether Brookside was treated in the same manner as other mortgagors in similar circumstances.

Once Brookside met its initial burden of producing some evidence that HUD's actions were arbitrary or capricious, then HUD has a duty to come

forth and contravene the Plaintiff's testimony and to demonstrate its fair treatment of the Defendant.

In considering whether or not Brookside has met its initial burden and what the contravening burden of HUD is, the state of the record upon which HUD made its decision to foreclose must be considered.

The agency must provide an adequate basis for its actions. If there are deficiencies in the record, the reviewing Court may not make up the deficiencies, nor may they supply a reasonable explanation for the action.

Brookside believes that the state of the record at the time HUD made its decision to foreclose, together with the evidence as produced by Brookside, is sufficient to cause HUD to come forward

with the evidence to show that it did not treat Brookside in an arbitrary and capricious manner. This being so, then Summary Judgment should not have been granted. The case should have been proceeded to a full hearing on the arbitrary and capricious issue and on the other issues including the Counterclaim.

What was the state of the Administrative Record at the time HUD made its decision to foreclose?

The owners had contributed more than Five-Hundred Thousand ($500,000.00) Dollars, of their own cash to the project.

Brookside had kept current on its mortgage payment from the date of inception of the mortgage, being August 31, 1977, through September 1, 1982. Although the project was being handled in a superior manner and was in excellent

condition, there was a substantial reduction in occupancy due to the serious drop in employment in the Beaver County area. The first payment which Brookside failed to make was September 1, 1982.

GNMA had requested of HUD to accept an assignment of the mortgage on its role as an insurer. This was accomplished on December 10, 1982, with no review, no discussion and no explanation. At this initial stage of Brookside's problems, Donald A. Myers, the Director of HUD, and Robert Kalish, the responsible individual of GNMA, begin the scenario that sets Brookside apart from other projects. This substantially different treatment of Brookside, resulting in HUD's arbitrary and capricious actions begins here.

According to Mr. Myers, when GNMA sees a mortgage getting into trouble, GNMA

and HUD have conferences from time to time on how to solve the mortgage problems. Usually GNMA is asked to consider deferral of principal payments. Meetings would occur between Mr. Myers and Mr. Kalish, prior to the assignment. However, this did not occur for Brookside. In fact, Donald A. Myers, and Robert Kalish, make it clear that in Brookside's case there was a strange but absolute lack of communication.

Mr. Kalish's Deposition also made it clear that the normal procedure is of careful consideration when GNMA makes an assignment. Mr. Kalish also shows that the Brookside matter was handled in an unusual manner in that no request was made of GNMA in this case and no contact was made between GNMA and HUD for the delay of the election. It is also reiterated by

Mr. Myers that there was no request of any meeting concerning Brookside.

The next part of the record was a work-out arrangement by Mercantile Mortgage Corporation, an agent of HUD and/or GNMA, for whom it was serving the mortgage, who strongly attempted to aid Brookside during this temporary difficulty. This work-out arrangement had been approved by the Pittsburgh Office of HUD, and in fact, was considered reasonable. The suggested work-out arrangement was rejected by one William Fox, a former member of HUD, who reviewed the proposal on the same day, March 7, 1983, and which review was concurred by Donald A. Myers on March 7, 1983. The analysis consists only of two pages in outline form. Although the work-out was in the limits of the June 18, 1982,

guidelines, Mr. Fox recommended rejection without awaiting the Pittsburgh Office comments, probably because it was known that the Pittsburgh Office was in favor of the work-out arrangement.

This recommendation against the work-out arrangement, has the note appended to it that the owners of Brookside are suing GNMA. As a matter of fact, the Brookside partnership had brought a law suit against HUD in 1981, because HUD would sell the mortgage on Brookside at fifty eight (58%) percent of the mortgage balance to anyone or any entity, except Brookside itself. This case was captioned Brookside v. GNMA, U.S. District Court for the Western District of Pennsylvania, No. 81-059. The Partnership brought a law suit against HUD in 1981, because HUD made Brookside accept shoddy construction work. This case was

captioned as Brookside v. United States, U.S. Court of Claims, No. 224-81C.

Donald A. Myers, not only concurred in the rejection of March 7, 1983, but drafted a letter on the same date to Mercantile Mortgage Corporation, demanding a shorter term work-out and capital contributions which were confiscatory and admittedly unfeasible. This left no room for any further negotiation, and that was the total effort of HUD in attempting to save a project which had been well run.

When one considers this meager record, one realizes that HUD cannot cogently explain why it exercised its discretion in the manner that it did. The record is bare of any analysis that would explain why a project which was being expertly run and was in outstanding physical condition, did not merit any

review and analysis, except for the two (2) meager sheets which were Mr. Fox's decision. There was the use of the most stringent requirements of the June 18, 1982, guidelines, on a project which deserved every possible break. There was no evidence in the record of any analysis or thought process concerning Brookside. There was even a refusal from the Pittsburgh Office in its analysis of the situation and of its opinion of the work-out arrangement. The Pittsburgh Office had orally approved the work-out arrangement, an analysis from that office would muddy the water and force some analysis or an explanation for the rejection. HUD could then proceed to reject the project with as few words as possible without such an analysis in a manner which is in the essence of an

arbitrary or capricious action.

This record leaves HUD with a case which has a delinquency, and a precipitous action without thought which leads to a mortgage foreclosure. This is simply not a sufficient record, and convicts HUD of being arbitrary and capricious.

What had Brookside presented to the Court and what had it attempted to present that would bolster its position that HUD had acted arbitrarily and capriciously?

The following matters were brought to the attention of the Court:

1. The deposition of Robert G. Speicher of the Pittsburgh Office of HUD, which makes it clear that he had agreed with the three (3) year work-out arrangement, and that the rejection included terms which were a drastic change in policy. In fact, Mr. Speicher was not

aware of some of these changes in policy.

2. That there had been approximately seven (7) projects in the Pittsburgh area, which had been in default, and there had been no foreclosure on any of them.

3. To bolster the issues of animus, which is suggested by the note in the Fox letter concerning the Brookside suit against GNMA, there is the Affidavit of Kenneth W. Behrend, which refers to the activity of Colonial Oaks against HUD. Colonial Oaks is a similar project which had substantially the same investors in Brookside. There had been a surcharge attempt by HUD against Colonial Oaks, and as a result, certain counter charges by Colonial Oaks against officials at HUD. This matter was eventually settled by HUD, in Brookside's opinion, after the First

Assistant Attorney, Paul McGrath, in a letter dated October 19, 1981, directed to Paul Campanella, Attorney for the HUD District which includes Pennsylvania, criticized some of Paul Steimer's actions as impermissible. Mr. Steimer, is an employee of HUD who is involved in the present foreclosure. The District Court refused to allow this letter, but Brookside considers this letter important bearing the issue of animus.

4. Only thirteen (13) months elapsed between the first month delay and the acceleration of the debt, and only sixteen (16) months elapsed between the delinquency and the filing of the suit. None of the reported cases which have been cited show this activity occurring is so short a time. In fact, the reported cases show the time period to be between three

(3) years and twelve (12) years. See: Little Earth of United Tribes v. U.S. Department of Housing and Urban Development, 584 F. Supp. 1287, (D. Minn., 1983); United States v. Beacon Terrace Mutual Homes, 594 F. Supp. 53 (D. Md. 1984); United States v. Victory Highway Village, Inc., 662 F. 2d 488 (8th Cir., 1981); United States v. Gross Realty and Construction Co., 586 F. Supp. 231 (E.D.Pa., 1984); United States v. Winthrop Tower, 628 F. 2d. 1028 (7th Cir., 1980); United States v. Prince Hall Village, Inc, 597 F. Supp. 118 (U.S.D.C. Cd.Il.); United States v. Occi Co., 758 F. 2d. 1160 (7th Cir. 1984). However, the Court does not deny that each of the cases cited show disparate treatment between all reported cases and Brookside. Brookside's point is that it is clear the treatment was

different and that the explanation only emphasized the fact that in other cases HUD made attempts to ameliorate the situation and to aid the defaulting mortgagor.

It is clear that under the present record, HUD has not shown that it treated any other defaulting mortgagor in the same manner that it treated Brookside. The record is devoid of any suggestion of similar treatment of other mortgagors and until that occurs, HUD must stand convicted of treating Brookside in an arbitrary and capricious manner. Brookside has more than met its burden of producing some initial evidence demonstrating that HUD was arbitrary and capricious. There is no doubt that a serious question of material fact exists and that this issue must be more fully

developed to give HUD a chance to show fair and equal treatment if it so desires.

## ARGUMENT II

**THE DUE PROCESS CLAUSE OF THE 5TH AMENDMENT IS VIOLATED BY NOT PERMITTING BROOKSIDE TO HAVE A HEARING ON ITS SET-OFF AGAINST THIS HUD REAL ESTATE FORECLOSURE WHERE THE CLAIM ASSERTED CAN BE SATISFIED BY A REDUCTION IN THE AMOUNT DUE UNDER THE MORTGAGE WITHOUT MAKING CLAIM AGAINST THE UNITED STATES TREASURY.**

The sue and be sued provisions of Act of August 23, 1935, Chap. 614; 49 Stat. at L. 684, 722, 12 USCA Section 1702, permit a set-off to be asserted against the Department of Housing and Urban Development and the Administrator. There

is no limitation in the National Housing Act prohibiting a set-off to reduce the balance claimed in a mortgage foreclosure proceeding

The only limitation to asserting in a mortgage foreclosure action a set-off arising out of the management of the mortgage being foreclosed upon is whether the set-off is an attack upon the United States Treasury. See: F.H.A. v. Burr, 309 U.S. 242 (1940); S.S. Silverblatt, Inc., v. East Harlem Pilot Block, 608 F.2d 28 (2nd Cir. 1979); Johnson v. Secretary of/and U.S. Department of Housing and Urban Development, 544 F. Supp. 925 (E.D. La. 1981); Manufacturers National Bank v. Brownstown Squares Apartments, 491 F. Supp. 206 (E.D. Mich. 1980); Bank of Denver v. Romstrom, 496 F. Supp. 242 (D. Colo. 1980); In Re Adana Mortgage Bankers,

Inc., 12 B.R. 973 (N.D. Ga. 1981); Capitol Indemnity Corporation v. Freedom House Development, 487 F. Supp. 839 (D. Mass. 1980); Steffer v. Thompson, et al., 415 U.S. 452 (1974); Fox, et al., v. Department of Housing and Urban Development, et al., 532 F. Supp. 540 (E.D. Pa. 1982).

It is asserted that the mortgage has the status of a legally recognized entity and the request to adjust the balance due thereunder is an action, if taken by set off, not against the Treasury, but only against the rest of the mortgage.

It is respectfully requested that Brookside be permitted to proceed to hearing against the mortgage limited to the net proceeds of the mortgage foreclosure.

## CONCLUSION

For all of the foregoing reasons, this Honorable Court should issue a Writ of Certiorari to the Court of appeals for the Third Circuit.

Joseph U. Esper

## AFFIDAVIT OF SERVICE

I hereby certify that three true and correct copies of this Petition for Writ of Certiorari were mailed, postage prepaid, this 4th day of February 1987, to the following adverse counsel:

Bonnie R. Schlueter, Esquire
633 U.S. Post Office & Courthouse
Pittsburgh, PA 15219

Nelson Chan, Esquire
U.S. Dept of Housing & Urban Development
105 S. 7th Street
Liberty Square Building
Philadelphia, PA 19106

Joseph U. Esper

Sworn to and subscribed
before me this 4th day
of February, 1987.

ELIZABETH [illegible], Notary Public
[illegible] County
My Commission Expires Oct. 20, 1990

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff, | ) | Civil |
| | ) | Action |
| vs. | ) | No. 84-363 |
| | ) | |
| BROOKSIDE LIMITED PARTNERSHIP | ) | |
| | ) | |
| Defendant. | ) | |

ORDER OF COURT

AND NOW, this 14th day of April 1986, this court having found that plaintiff did not act arbitrarily, contrary to its self-prescribed procedures or in violation of law,

IT IS ORDERED that plaintiff's motion for summary judgment as to its claim and as to defendant's counterclaim shall be and hereby is granted;

IT IS FURTHER ORDERED that judgment shall be and hereby is entered in favor of plaintiff, and against defendant, in the

following amount, which we have determined to be reasonable in view of the mortgage note held by plaintiff:

| | |
|---|---|
| Unpaid principal. . . . | $2,694,726.56 |
| Unpaid interest at 7 1/2 percent through April 14, 1986. . . . . | $ 719,779.29 |
| Service charge . . . . . | $ 1,099.33 |
| Advances . . . . . | $ 643.15 |
| Less funds held by FHA . . . . . | $ (53,510.85) |
| TOTAL AMOUNT . . . . . | $3,362,737.48 |

together with interest from the date of judgment at the legal rate and costs of suit;

IT IS FURTHER ORDERED that the United States shall be and hereby is entitled to immediate possession of the real and personal property set forth in the Mortgage and Security Agreement for the purpose of collecting rents and income therefrom and for the purpose of pre-sale inspection and sale, together with cash [escrow accounts, bills, etc.], books,

records, accounts, equipment, furniture, keys to the various rental units, copies of present lease agreements for the rental units and all other information necessary for the advertisement, inspection and sale of the subject property;

IT IS FURTHER ORDERED that the Mortgage and Security Agreement shall and hereby is foreclosed an that the real and personal property set forth in said agreement be exposed for sale to satisfy plaintiff's judgment, and expenses of sale and the amount adjudged due plaintiff by defendant be paid from the sale.

Donald E. Ziegler
Donald E. Ziegler
United States District Judge

cc: Joel B. Strauss, AUSA
George K. Hanna, Esquire
Paul J. Votilla, Esquire

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff, | ) | Civil |
| | ) | Action |
| vs. | ) | No. 84-363 |
| | ) | |
| BROOKSIDE LIMITED PARTNERSHIP | ) | |
| | ) | |
| Defendant. | ) | |

MEMORANDUM OPINION

ZIEGLER, District Judge

The United States, on behalf of the Secretary of the Department of Housing and Urban Development (HUD), seeks compensatory damages of $3,362,737.48 for the unpaid principal and interest on a note and mortgage encumbering Brookside Gardens Apartments, a 120-unit multi-family rental project in Beaver Falls, Pennsylvania. Plaintiff has moved for summary judgment as to damages; the United States also seeks an order for immediate

possession; and an order directing foreclosure of the mortgage and a sale of the property subject to the mortgage and security agreement. Defendant contends that HUD's decision to foreclose was arbitrary, capricious and an abuse of discretion. Given our limited scope of review of administrative decisions and the supporting documentary evidence supplied by plaintiff, we find no genuine issue of material fact concerning whether the agency acted arbitrarily in deciding to foreclose the mortgage. Summary judgment will be entered for plaintiff.

I. History of Case

In August 1977, defendant executed a mortgage note of $2,734,000, secured by Brookside Limited Partnership's property in Beaver County. The mortgage note later was assigned from the Government National

Mortgage Association to HUD. According to the parties, defendant failed to pay the September 1982 installment payment on the loan and has been delinquent in its payments since that time. Evidence suggests that the project, an on-going concern, encountered financial problems as the vacancy rate increased.

Mercantile Mortgage Corporation, a private company retained by HUD, attempted to work out a payment plan by which Brookside could avoid a mortgage default. MMC's workout recommendation, submitted in February 1983, was rejected by HUD because it did not conform to HUD policy and did not appear to be feasible. Affidavit of Donald A Myers, at paragraphs 12, 13 and 14. In May 1983, MMC recommended foreclosure.

In February 1984, after several

attempts by both parties to reach a settlement short of foreclosure, HUD filed suit in this mortgage agreement. Exhibit A to complaint. HUD also sought interest at a rate of 9 percent per year. (Plaintiff's motion for summary judgment reduces the requested interest to reflect the 7 1/2 percent rate stated in the mortgage note.) HUD also sought immediate possession of the encumbered property and the right to operate the property and apply rental income toward payment of the indebtedness.

Shortly thereafter, HUD moved for summary judgment under the National Housing Act, 12 U.S.C. Section 1713 (k), which authorizes the Secretary to acquire possession of the title to any property covered by an assigned mortgage and to institute foreclosure proceedings in the

event of default. Defendant rejoined that HUD's action to foreclose was arbitrary in that the agency refused to negotiate a workout agreement and refused to permit defendant to bid in an auction sale. We granted discovery to permit defendant to adduce evidence to support its contention that HUD acted arbitrarily and in violation of law in the Brookside case. Discovery is now closed. Plaintiff has again moved for summary judgment.

II. Scope of Review

Under the Administrative Procedure Act, 5 U.S.C. Section 701 et seq., we may review final decisions of administrative agencies. A decision by the Secretary of HUD to foreclose on a mortgage note is reviewable. Kirby v. United States, 675 F.2d 60 (3d Cir. 1982); United States v.

Winthrop Towers, 628 F.2d 1028 (7th Cir. 1980).

Our review of administrative rulings is narrow and does not permit a de novo review of the facts. Camp v. Pitts, 411 U.S. 138 (1973). The appropriate standard for review is whether the agency's adjudication was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," as specified in 5 U.S.C. section 706(2)(A). "In applying that standard, the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." Camp v. Pitts, supra, at 142.

While courts must generally accord substantial deference to administrative agencies in areas such as fact-finding,

lesser tolerance is required in matters pertaining strictly to an agency's observance and implementation of its self-prescribed procedures. Powell v. Heckler, 783 F.2d 396 (3d Cir. 1986). Our review thus considers whether HUD acted arbitrarily in its treatment of the Brookside project, whether HUD properly observed its self-prescribed procedures and whether HUD acted in accordance with law. The mortgagor, here Brookside, has the initial burden of producing evidence to comply with applicable law. United States v. Victory Highway Village, Inc., 662 F.2d 488, 494 (8th Cir. 1981); United States v. Winthrop Towers, 628 F.2d 1028 (7th Cir. 1980).

III. Discussion

We find that defendant has failed to

meet its burden of producing evidence that HUD's treatment of the Brookside default was materially disparate from its treatment of other projects in default. Defendants have not proffered any evidence that HUD customarily accelerated the debt more than 13 months after default and sought foreclosure more than three years after default. The five cases cited by defendant do not raise a genuine issue of material fact as to whether HUD's procedures in the Brookside case were arbitrary.

In Little Earth of United Tribes v. United States, 584 F. Supp. 1287 (D. Minn. 1983), HUD sought foreclosure in 1982 after the mortgagor had been in default since 1975. The court, recognizing that HUD had power to seek foreclosure in 1975, attributed the agency's delay to

forbearance. In United States v. Beacon Terrace Mutual Homes, 594 F. Supp. 53 (D. Md. 1984), the mortgagor defaulted in 1974 and foreclosure was sought in 1982. Evidence suggests that HUD postponed foreclosure action because several commercial developers expressed interest in purchasing the project. In United States v. Gross Realty and Construction Co., 586 F.Supp. 231 (E.D.Pa. 1984), foreclosure followed default by five years. In that case, the mortgagor defaulted after severe structural problems arose, and the foreclosure action followed a workout agreement. In United States v. Winthrop Towers, supra, HUD acquired the mortgage assignment in 1975 when the mortgagor was in default, entered into a workout in 1976 and sought foreclosure in late 1978. None of these

authorities hold that HUD acted arbitrarily in seeking foreclosure.

Each of the cited cases indicates reasonable administrative procedures tailored to the peculiar facts of the housing project. Where workout arrangements have been feasible or where delay was appropriate to repair structural deficiencies or to attract buyers, foreclosure was not immediate. Applying these procedures to the Brookside case, we find no evidence of arbitrary action. Defendant defaulted in 1982. HUD's agent could not negotiate a workout agreement that would protect the agency's lien in the property. Defendant failed to submit a proposal that either ensures no loss of the mortgage loan or extends payments over a reasonable length of time. Affidavit of Donald A. Myers, at paragraphs 12 and 21.

Given these facts, we find an absence of material fact concerning whether HUD properly exercised its discretion to foreclose in 1984 under the National Housing Act. 42 U.S.C. sec. 1441. United States v. Winthrop Towers, supra, at 1034.

We next find that defendant has failed to meet its burden of producing evidence that HUD failed to observe self-prescribed foreclosure procedures. The state procedures relied upon by plaintiff are contained in a June 18, 1982, memorandum entitled, "Policy for Projects with HUD-Held Mortgages." The memorandum contains four options for HUD where the mortgagor is in default: (1) the owner brings the mortgage current with cash contributions; (2) execute a workout agreement; (3) execute a mortgage modification agreement; or (4) foreclose.

The option chosen must "achieve the best financial return for the government." Memo at II(B). According to the memorandum, "HUD should enter into a workout arrangement only when the workout can either resolve all the current problems of the project, reinstate the mortgage and ensure the long-term financial health for the project" or where the sale of the project or the restructuring of the ownership entity is expected. Memo at II(C).

Defendant argues that HUD violated its policy by not approving a workout arrangement. The policy places the burden of proposing an acceptable arrangement on the project owner. If the proposal fails to adequately protect the government's interests, HUD retains the right to seek foreclosure. Affidavit of Donald A.

Myers, at paragraphs 21, 22.

A fair reading of the HUD policy reveals that the primary objective is protection of its investment for the purpose of ensuring sufficient resources for national housing needs. Memo at II(C). A workout arrangement is not required where the arrangement would violate national housing objectives. United States v. Winthrop Towers, supra, at 1035. Given the fact that the two workout arrangement proposals at bar would have increased the government's losses over an extended period of time, we find, as a matter of law, that HUD's decision to seek foreclosure of the Brookside project did not violate its stated mortgage default policy.

We further find that defendant has failed to meet its burden of producing

evidence that HUD's decision to accelerate payments on the mortgage note and to seek foreclosure was contrary to law.

As rehearsed, the National Housing Act permits HUD to institute foreclose proceedings in the event of a mortgage default. 12 U.S.C. sec. 1713(k). Also, the mortgage note provides for accelerated payments upon default. As the note states, at paragraph 7: "If default be made in the payment of any installment under this Note, and if such default is not made good prior to the due date of the next such installment, the entire principal sum and accrued interest shall at once become due and payable without notice, at the option of the holder of this Note."

IV. Counterclaim

Plaintiff's motion for summary judgment as to defendant's counterclaim will be granted. The counterclaim asserts that the Government National Mortgage Association or HUD prevented defendant from bidding at the mortgage auction, contrary to the objective of national housing policy to prevent foreclosures. The counterclaim seeks injunctive relief requiring HUD to enter a workout agreement.

First, the relief requested cannot be ordered under our limited scope of review. We need only determine whether HUD's action was arbitrary., contrary to self-prescribed procedures or violative of law. Under the National Housing Act and HUD's policy governing foreclosures, a workout arrangement is suitable only where the

government's lien can be protected. Based on the proposal of defendant, a workout arrangement is not feasible in the Brookside case. See affidavit of Donald A. Myers, at paragraphs 21, 22.

Second, the leading case teaches that Brookside is without standing to challenge HUD's determination of defendant's lack of qualifications to bid at the mortgage auction. As the Court of Appeals held in Moses v. Banco Mortgage Co., 778 F.2d 267, 271 (5th Cir. 1985), a disappointed bidder can seek judicial review of a government bidding procedure only if within the zone of interests the procedure is intended to protect. Association of Data Processing Service Organization, Inc. v. Camp, 397 U.S. 150 (1970). As the Court of Appeals recently held in Moses v. Banco Mortgage Co., supra, at 271, the Federal Housing

Act and HUD regulations are not "intended directly to benefit either owners of low income housing projects or parties bidding at the HUD mortgage auction." The court then held that a project owner was without standing to challenge the bidding procedure.

Defendant asserts that plaintiff waived its defense of standing by not asserting the defense in its reply to counterclaim. The defense was not waived because standing is a threshold requirement under Article III. Allen v. Wright,_____ U.S._____, 104 S. Ct. 3315 (1984).

V. SUMMARY

Because defendant has failed to meets its burden in producing evidence that Hud's decision to accelerate the mortgage

payments upon default and to seek foreclosure was arbitrary, contrary to self-prescribed procedures or violative or law, summary judgment will be granted to plaintiff. Because our limited scope of review does not permit the relief requested and because Brookside is without standing to challenge HUD's bidding procedures, plaintiff's motion for summary judgment as to the counterclaim will be granted.

A written order will follow.

Donald E. Ziegler
Donald E. Ziegler
United States District Judge

Dated: April 11, 1986

cc: Joel B. Strauss, AUSA
George K. Hanna, Esquire
Paul J. Votilla, Esquire

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Nos. 86-3353, 86-3534

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UNITED STATES

v.

BROOKSIDE LIMITED PARTNERSHIP,
Appellant

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On Appeal from the United States District Court for the Western District of Pennsylvania (Pittsburgh)
(D.C. Civil No. 84-363)
District Judge: Donald E. Ziegler

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Submitted Under Third Circuit Rule 12(6)
November 3, 1986

Before: SLOVITER and STAPLETON, Circuit Judges, and GREEN, District Judge*

(Filed November 7, 1986)

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MEMORANDUM OPINION

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* Hon. Clifford S. Green, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

SLOVITER, Circuit Judge.

Brookside Limited Partnership, defendant in the district court, appeals from the district court's grant of summary judgment to the plaintiff United States foreclosing the mortgage on Brookside Apartments, a multifamily housing project in Beaver County, Pennsylvania; granting the United States immediate possession of the property; and fixing the amount of the debt at $3,362,737.48 together with interest form the date of judgment at the legal rate and costs of suit.

Brookside filed its first appeal, docketed as No. 86-3353, while a timely motion for reconsideration was pending, and hence the notice of appeal was premature. It filed a second notice of appeal, docketed as No. 86-3534, from what was concededly the final judgment. The

parties agree that our consolidation of the two appeals removes any question of appellate jurisdiction.

It is undisputed that Brookside failed to make mortgage payments due on September 1, 1982 and thereafter on a note held by the Government National Mortgage Association (GNMA) and guaranteed by the United States Department of Housing & Urban Development (HUD). GNMA assigned the mortgage to HUD as insurer on December 10, 1982. On October 24, 1983 HUD gave Brookside 30 days notice of its intention to accelerate the entire debt, and shortly thereafter HUD declared default and accelerated the debt. HUD then filed this action to enforce the debt and foreclose on the mortgage.

Brookside argues that HUD acted arbitrarily and capriciously in various

respects in its treatment of the Brookside project. We must decide whether there was any genuine issue of material fact that would have precluded entry of summary judgment for the United States. We agree with the district court that there was not. The party moving for summary judgment has the initial burden of identifying evidence which it believes demonstrates the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 106 S. Ct. 2548, 2553 (1986). However, where the nonmoving party bears the burden of proof, it must by affidavits, or by the depositions and admissions on file, "make a showing sufficient to establish the existence of [ever] element essential to that party's case." Id.

Brookside first argues that it was

arbitrary and capricious of GNMA to elect to assign the mortgage to HUD, because HUD and GNMA did not confer about how such an assignment might be avoided. Review of the complete record, rather than the portions taken in isolation referred to by Brookside, establishes that there is no duty to confer. Further, Brookside has not shown that it was harmed by the assignment, because after the assignment HUD steps into the shoes of the lender.

Brookside argues that it was treated differently than other mortgagors and that HUD acted arbitrarily in failing to want mortgage relief and make workout arrangements prior to foreclosure. The district court found that Brookside "failed to meet its burden of producing evidence that HUD's treatment of the Brookside default was materially disparate

from its treatment of other projects in default," App. at 408a, and that finding is supported by the record. Brookside appears to contend that it would have been able to produce such evidence had HUD fully answered its interrogatories. HUD fully answered the interrogatories as propounded, and Brookside cannot, at this late date, contend that HUD should have answered the interrogatory that it intended but failed to articulate.

Brookside also argues that HUD's action in failing to approve the workout arrangement proffered by its agent was arbitrary and capricious. The workout arrangement did not comply with the applicable HUD policy, set forth in a June 18, 1982 HUD memorandum regarding foreclosure and mortgage relief. The district court found that Brookside

"failed to submit a proposal that either ensures no loss of the mortgage loan or extends payment over a reasonable length of time." App. at 409a. The record supports this conclusion.

Brookside also contends that HUD's decision to seek foreclosure of the Brookside project violated HUD's mortgage default policy. Under the policy the project owner has the burden of proposing an arrangement that adequately protects the government's interests. The district court found as a matter of law that there was no violation because the workout arrangement proposals offered would have increased the government's losses over an extended period of time. This finding is supported by the record.

Finally, Brookside presented no admissible evidence to support its

contention that HUD's actions in connection with the foreclosure of the Brookside property were motivated by animosity. Therefore, the district court did not err in granting summary judgment for the government on its claim.

Brookside counterclaimed alleging that GNMA or HUD prevented it from bidding at mortgage auctions, thus preventing it from purchasing its own mortgage at auction at a discount. The district court held that Brookside had no standing to challenge HUD's bidding procedure because it was not within the zone of interest that the bidding procedure is intended to protect. The district court followed the holding of Moses v. Banco Mortgage Co., 778 F.2d 267 (5th Cir. 1985), that individual bidders do not have standing to challenge noncompliance with HUD's bidding

procedure because the purpose of the United States Housing Act of 1937 was to provide housing for the poor, and not to benefit owners of low income housing projects. The district courts' holding was not erroneous as a matter of law.

For the foregoing reasons, we will affirm the district court's order granting summary judgment on behalf of the government on both the complaint and brookside's counterclaim.

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TO THE CLERK:

Please file the foregoing opinion.

Dolores K. Sloviter

Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Nos. 86-3353, 86-3534

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UNITED STATES

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(D.C. Civil No. 84-363)
District Judge: Donald E. Ziegler

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Before: SLOVITER and STAPLETON, Circuit Judges, and GREEN, District Judge*

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JUDGMENT

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This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was submitted under Third Circuit Rule 12(6) on November 3, 1986.

On Consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the district court entered July 2, 1986 be, and the same is, hereby affirmed.

Costs taxed against the appellant.

ATTEST:

Sally Mrvos
Clerk

November 7, 1986

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* Hon. Clifford Scott Green, United States District Court for the Eastern District of Pennsylvania, sitting by designation.